

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL S. DAOUDI,

Plaintiff-Appellant,

v

SHELLY SUE ADKINS,

Defendant-Appellee.

UNPUBLISHED

July 15, 2008

No. 276953

Washtenaw Circuit Court

LC No. 06-000971-CK

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition, denying plaintiff's motion to amend the complaint, and denying plaintiff's motion for a protective order sealing the records of this case. We affirm.

Plaintiff and defendant entered into a settlement agreement, pursuant to which defendant agreed, in exchange for consideration, to keep strictly confidential and to not disclose any information related to defendant's acts and conduct or the relationship between the parties prior to the effective date of the agreement. Language in one part of the agreement set forth a requirement that "all notices, claims and other communications hereunder shall be in writing and made by hand delivery, registered or certified mail, facsimile or overnight courier, guaranteeing next-day delivery." Another part of the settlement agreement required both parties to destroy any confidential information and to provide the other with written confirmation of such destruction within 14 days of the effective date of the agreement.

On August 3, 2006, defendant's counsel provided plaintiff's counsel with an unsigned draft version of a verification letter, requesting confirmation that the language of the proposed verification letter would be acceptable to plaintiff. Five days later, defendant sent a signed, notarized, and finalized verification letter by first class mail to plaintiff's counsel. Plaintiff's counsel denied receiving this signed and notarized version. Plaintiff ultimately received a duly executed copy of the verification on December 14, 2006.

Because plaintiff did not receive the required verification that plaintiff had destroyed confidential materials by any of the modes of communication that he claimed were required under the agreement, plaintiff filed suit against defendant for breach of contract. Plaintiff sought \$75,000 in liquidated damages, as provided for in the settlement agreement. A copy of the settlement agreement was attached to plaintiff's complaint.

Defendant moved for summary disposition, asserting that the purported breach was immaterial and caused no actual damage, and that the \$75,000 liquidated damages provision was unenforceable due to its punitive nature. An affidavit from defendant's former attorney was attached in support of the motion, and referenced a "potential sexual assault case" and "criminal sexual conduct on the part of [plaintiff]."

Plaintiff asserted that the affidavit constituted an additional breach of the contract because defendant's agent had disclosed confidential information in violation of the settlement agreement. He further asserted that defendant had failed to give notice of her intent to provide such disclosure. Plaintiff moved for leave to amend the complaint to include these additional alleged breaches, and sought a protective order to seal the records of this case.

The trial court granted defendant's motion for summary disposition and dismissed plaintiff's claims, ruling that there was no genuine issue of fact concerning whether defendant had complied with the "spirit and purpose of the relevant confidentiality provision" of the settlement agreement. The trial court also ruled that plaintiff's motions to amend the complaint and to seal the record should be denied as moot in light of the ruling on the motion for summary disposition.

I. Summary Disposition

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree.

We review de novo the trial court's decision on a motion for summary disposition. *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 123; 693 NW2d 374 (2005). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In ruling on such a motion, the trial court must consider the pleadings, as well as depositions, affidavits, admissions, and any other documentary evidence, MCR 2.116(G)(5), in a light most favorable to the nonmoving party, *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Summary disposition is appropriate if the opposing party fails to present evidence establishing the existence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

A contract must be construed in its entirety to determine the intent of the parties and to give legal effect to its provisions as a whole. *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516 (2000). Clear, unambiguous, and definite contractual language must be enforced as written, and courts may not write a different contract for the parties. *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003).

The provisions of the settlement agreement pertinent to this appeal appear under separate headings in the contract. The first provision appears under the heading "Indemnification," and provides:

All notices, claims and other communications hereunder shall be in writing and made by hand delivery, registered or certified mail, facsimile or overnight air courier, guaranteeing next-day delivery.

The second provision at issue appears under the heading “Confidentiality and Non-Disclosure,” and provides:

Destruction of Confidential Information. Both parties shall immediately destroy and provide each other with written confirmation of such destruction of all Confidential Information (including notes, writings and other material developed therefrom by the parties) and all copies thereof and retain none for their files. Both parties shall promptly destroy all memoranda, notes, and other writings prepared by the parties or on their behalf based upon the Confidential Information and both parties shall provide certification to the effect that they have fully complied with the requirements of this section. All written confirmations and certifications demonstrating compliance with this provision must be delivered to each party within 14 days of the Effective Date, or it will be deemed a breach of this Settlement and Release Agreement.

Regardless of whether defendant exactly complied with the verification requirements of the settlement agreement, we conclude that the liquidated damages provision cannot be enforced because it would serve as a penalty on the facts of this case.

A liquidated damages provision is an agreement by the parties that fixes the amount of damages in case of a breach of contract, and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998). A liquidated damages provision is appropriate if the actual damages would be uncertain and difficult to ascertain, or would be purely speculative. *Saint Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006). Whether a liquidated damages clause is valid depends on conditions at the time the contract was signed, and not at the time of the breach. *Solomon v Dep’t of State Highways and Transportation*, 131 Mich App 479, 484; 345 NW2d 717 (1984).

Plaintiff asserts that the liquidated damages provision in the settlement agreement is enforceable because (1) the agreement explicitly states that the provision is not a penalty, (2) defendant voluntarily agreed to the terms, (3) damages were uncertain at the time the contract was entered into, and (4) the amount of \$75,000 was reasonable at the time the parties entered into the contract. We disagree.

Even when the parties have agreed to a certain sum as liquidated damages, the provision can be invalidated if it is, in fact, a penalty. *Randall v Douglass*, 321 Mich 492, 496; 32 NW2d 721 (1948). “Where, by the terms of a contract, a sum is mentioned as “liquidated damages” for a nonperformance of several distinct stipulations of very different degrees of importance, and this sum is to be payable equally on a failure to perform the least, as to that to perform the most, important or whole of them together, it is in legal effect a penalty” *Id.*, quoting *Decker v Pierce*, 191 Mich 64, 70; 157 NW 384 (1916).

Here, the terms of the liquidated damages provision required defendant to pay plaintiff \$75,000 in the event of *any* breach or default under the agreement. Failure to meet the contractual requirement concerning verification of the parties’ destruction of confidential information was specifically designated as a breach. Under the language of the agreement,

however, defendant would have been required to pay \$75,000 for any one of a number of possible breaches, including disclosure of confidential information, failure to destroy confidential information, or failure to provide verification of the destruction of confidential information. Because the sum of \$75,000 was “mentioned as “liquidated damages” for a nonperformance of several distinct stipulations of very different degrees of importance, and [was] to be payable equally on a failure to perform the least,” we must conclude that the contractual liquidated damages provision was “in legal effect a penalty.” *Id.*

Further, we question the reasonableness of the \$75,000 liquidated damages provision. Plaintiff asserts that \$75,000 was a reasonable amount because he was concerned at the time of contracting about possible injury to his reputation. However, there is simply no evidence in this case that defendant failed to destroy any potential injurious confidential information. Instead, plaintiff’s complaint was based solely on defendant’s alleged failure to strictly comply with the verification requirements of the parties’ agreement. Even assuming that defendant did in fact breach the contract by failing to provide proper verification, we cannot conclude that such a minor breach could have resulted in \$75,000 worth of damage to plaintiff. Because no actual amount of damages was established in this case, the trial court properly granted summary disposition in favor of defendant.¹ See, e.g., *Shippey v Madison Dist Pub Schools*, 55 Mich App 663, 668; 223 NW2d 116 (1974) (to prevail on a breach of contract claim, a plaintiff must establish damages).

II. Motion to Amend

Plaintiff also argues that the trial court abused its discretion by denying his motion to amend the complaint to include allegations of further breach of contract, related to the alleged disclosures of confidential information in an affidavit attached to defendant’s motion for summary disposition. We disagree.

We review for an abuse of discretion the trial court’s decision to grant or deny leave to amend the pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

When a trial court grants a motion for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10), the opportunity for the nonprevailing party to amend its pleadings pursuant to MCR 2.118 should be freely given. MCR 2.116(I)(5). However, an amendment is not justified if it

¹ We acknowledge that even when damages cannot be determined with any degree of certainty, as is true in this case, a plaintiff is typically entitled to nominal damages upon a defendant’s breach of contract. *Vandenberg v Slagh*, 150 Mich 225, 229; 114 NW 72 (1907). Nonetheless, we conclude that plaintiff was entitled to no recovery in this case. It is unlawful in Michigan for any person to contract to conceal or keep secret the commission of a criminal offense by another. MCL 750.149. To the extent that the parties in this case attempted to contractually agree to conceal criminal conduct by plaintiff, their contract was illegal and void as against public policy. *American Trust Co v Michigan Trust Co*, 263 Mich 337, 339; 248 NW 829 (1933); *Mino v Clio School Dist*, 255 Mich App 60, 71; 661 NW2d 586 (2003). “When plaintiff cannot establish its cause of action without relying upon an illegal contract, [he] cannot recover.” *American Trust*, *supra* at 339.

would be futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). An amendment would be futile if, ignoring the substantive merits of the claim, it would leave the claim legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990). A party asserting a breach of contract must prove damages resulting from the breach. *Alan Custom Homes Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Plaintiff has not alleged, much less offered proof, of any damages resulting from any of the alleged additional breaches of the settlement agreement. The trial court did not abuse its discretion by refusing to allow plaintiff to amend his complaint because such an amendment would have been futile.

III. Motion for Protective Order Sealing Records

Finally, plaintiff argues that the trial court erred by denying his motion for a protective order sealing the records in this case. We disagree.

The use of the word “may” in MCR 8.119(F) indicates a discretionary provision. Thus, application of the rule is reviewed for abuse of discretion. See, e.g., *Howard v Bouwman*, 251 Mich App 136, 145; 650 NW2d 114 (2002).

MCR 8.119(F) allows the trial court to order that court records be sealed in whole or in part. However, the trial court’s authority to do so is limited to circumstances in which (1) a party has filed a written motion that identifies the specific interest to be protected, (2) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and (3) there is no less restrictive means to adequately and effectively protect the specific interest asserted. MCR 8.119(F)(1)(a)-(c). This final requirement demonstrates the principle that judicial records are matters of which the public generally has a right to know.

Plaintiff has failed to demonstrate that sealing the records in this case would be the least restrictive means to adequately and effectively protect his name, image, and professional reputation, especially given that plaintiff himself instituted the suit that has led to possible public disclosure of the purportedly sensitive information. MCR 8.119(F)(1)(c). We are not persuaded by plaintiff’s assertions that his own disclosure, namely the attachment of the settlement agreement to his complaint, was substantially different from the disclosures by defendant. The trial court did not abuse its discretion by declining to seal the records of this case. See *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007) (observing that “an abuse of discretion occurs only when the trial court’s decision is outside the range of reasonable and principled outcomes”).

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra